In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION, PETITIONER

v.

G. W. BURLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

The United States urges the Court to grant the petition for rehearing in this case because (1) the decision has had and is likely to have extremely serious consequences in imperiling established machinery for the peaceful disposition of grievance cases; (2) the significance of the case was not appreciated by many groups vitally interested, including the Government, and the questions passed upon by the Court were not adequately explored in the arguments submitted by the parties; (3) the statute may be, and we think should be, construed in a manner which will avoid

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the unfortunate effects of the present ruling and at the same time preserve the rights of individuals with which the Court was properly concerned.

1. The immediate effect of the decision was to halt the operations of major Divisions of the National Railroad Adjustment Board, the body established under the Act to handle grievance cases. The carrier members of the Board have refused to hear cases in which the unions did not present individual authorizations or powers of attorney from the employees concerned. That had never been deemed necessary in the past. The unions have since undertaken to secure such authorizations, and a relatively small number of cases have been handled on that basis. A subsequent disagreement as to whether an authorization from every employee is necessary in a test case brought by one but affecting all craft members has closed down the First Division of the Board again. The Secretary of that Division has informed us that new cases are not being filed, that the employees are thoroughly dissatisfied, and that the outlook is for settlement of the disputes through resort to economic strength instead of through the normal peaceful channels. The Third Division, which with the First hears 94 per cent of the Board's cases,[1] has also practically ceased operations. The opinion also would seem to have thrown doubts upon the validity of most of the awards of the

[1] See National Mediation Board, *Ninth Annual Report*, pp. 54–60.

Adjustment Board in the past involving accrued claims, inasmuch as the *Elgin* case itself permits employees to sue independently of a prior adverse decision of the Board in a proceeding by the union brought on their behalf but, as the Court assumed, without *express* authorization.

Even more significantly, the decision impedes the ordinary settlement of disputes between carriers and unions on the property, inasmuch as the carriers see no point to negotiating with a union if the employee involved may disregard any decision which he regards as unsatisfactory.

To some extent these difficulties will be cured if the unions obtain authorizations or powers of attorney from individuals. The organizations will be able to obtain these from many of the men. But inasmuch as most grievance matters were handled through union representatives without regard for special authorizations, the decision does obstruct the customary processes by which this type of labor dispute was resolved. And since many disputes affect all or a large portion of a craft, limitation of the representative's power to negotiate a settlement to those who have authorized it to act on their behalf would be likely to produce a lack of uniformity which is not compatible with harmonious labor relations. Apart from this and perhaps of greater importance, common types of grievance cases involve a great many men, and cannot be regarded as settled

unless all are bound. For example, if the issue relates to whether a man at the head of the list has lost his seniority, the status of every man beneath him is affected. If a power of attorney is required to be obtained from all of these men, final disposition of the controversy might be impossible under the Court's present decision.

These effects may not be limited to the railroad field if the same principles are applied under the National Labor Relations Act, a measure which has frequently been assumed to parallel the Railway Labor Act in many pertinent respects.[3] This would mean that the decision would affect labor relations generally throughout the nation.

2. The number and the contents of the various briefs filed in support of the petition for rehearing demonstrate both that important national interests vitally affected by the Court's decision did not appreciate the significance of the case and that pertinent material and arguments were not brought to the Court's attention.

3. The opinion of the Court holds that the collective representative does not have an exclusive right to handle grievance cases, and that therefore it can only represent individuals in such matters if it has secured authorization as agent from them. In the light of the problems presented in *Steele* v. *Louisville & Nashville R. Co.*,

[3] See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332; *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342.

323 U. S. 192, and *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and of the practice of the Adjustment Board and of some of the organizations with respect to individuals' claims, we share the Court's solicitude as to the rights of individuals in grievance cases.[3] We suggest, however, that the cases cited above point the way to one form of protection of individual rights without the impairment of the collective bargaining process which this decision threatens. Furthermore, we are in agreement with the Court's premise that individual employees have a right to present grievances on their own behalf. This accords them further protection, particularly where, as under the Railway Labor Act, such presentation may be made through unions other than the collective representative.[4]

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[3] See the briefs for the United States as *amicus curiae* in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338, and *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192.

[4] In Point V of the brief for the Government as *amicus curiae* in *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 338, the position was taken that grievances could be presented by individuals and minority unions. Under the National Labor Relations Act, the National Labor Relations Board has held that grievances may be presented only by individuals, and its position in this respect has been upheld by the Circuit Court of Appeals for the Fifth Circuit. *Matter of Hughes Tool Co.*, 56 N. L. R. B. 981, enforced in this respect in *Hughes Tool Co.* v. *National Labor Relations Board*, 147 F. 2d 69. These divergent conclusions are required by the legislative history of the two Acts, as noted in the Government's brief in the *M-K-T* case at p. 78, note 65.

The Court's conclusion from this premise that an actual grant of authority by the individual to the collective representative must be proved entails the unfortunate consequences to which we have referred. It is the purpose of this memorandum to suggest a less extreme position which to a large extent will reconcile the need for protecting the rights of the individual with the necessities of the bargaining process, irrespective of the precise bounds of the individual employee's right to participate affirmatively. The rule suggested would in itself be to the great advantage of the individual employees in the vast majority of cases.

Our thought in brief is this. In the normal case the collective representative will act on behalf of members of the bargaining unit on grievance matters. The individual employee will customarily be aware that the representative is doing so, either generally or in the particular case, since such matters are doubtless discussed among the employees before complaints are filed with the employer. As long as the collective representative is acting without discrimination against the individual, the failure of the individual to take independent action himself or to deny the representative's right to proceed in his behalf would appear, as matter of fact, to manifest his acquiescence in the conduct of the representative. Thus, in the ordinary case, such as is here pre-

sented, where no repudiation by the employee appears, the employer should be entitled to presume, or assume, that the collective representative has the necessary authority. The individual can assume the right to speak for himself whenever he pleases, prior to a final settlement. And if the representative is not acting "fairly" he would not be bound in any event. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203. On the other hand, in the ordinary case, where none of those factors is present, the employee has the benefit of the collective representation, which in the long run is unquestionably greatly to his advantage.

We think the suggested presumption has a factual foundation. But we do not regard the controlling factor to be whether the acquiescence by the employee would constitute ratification or authorization under strict agency principles. For although Section 2, paragraphs First, Second and Sixth of the Railway Labor Act may not, when read with Section 2, Fourth, and Section 3, First, (i) and (j), be interpretable as giving the collective representative exclusive rights, they certainly support the construction that the carrier is entitled to negotiate on grievance matters with the representatives in the absence of any facts implying the contrary.

Section 2, First, makes it the duty of all carriers to exert every reasonable effort "to settle

all disputes," including those arising out of grievances, in order to avoid interruptions to transportation. Section 2, Second, then provides that "*All* disputes * * * shall be considered, and, if possible, decided, * * * in conference *between representatives* designated and authorized so to confer * * *." The clear implication from these paragraphs is that—at least in the absence of any reason to the contrary in the particular case—all disputes, including those relating to grievances, should be handled through the collective representative.

Section 2, Sixth, removes any doubts as to this. For it provides that:

> In case of a dispute between a carrier or carriers and its or their employees, *arising out of grievances* or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of *the designated representative* or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held. * * * [Italics supplied.]

This paragraph states specifically that the carrier shall confer on grievance matters with the employees' designated representative, and was un-

doubtedly intended to require conferences with the collective representative in the ordinary case without need for further individual power of attorney.[8]

Congress so provided, of course, because it believed that such a mandatory requirement would best effectuate the statutory policy of insuring the disposition of these controversies peacefully and without resort to economic strength. This policy can be harmonized with the provisions in Section 2, Fourth, and 3, First, (j) upon which the Court largely predicated its decision if the employer is entitled to presume that the collective representative, acting in good faith, has the necessary authority unless the contrary appears.

Acceptance of this suggestion would lead, we believe, to reversal of the decision below, since no claim has been made by respondents that the representative was not acting in good faith or that they or any of them ever affirmatively repudiated the action of the representative prior to final settlement with petitioner or final disposition of the case by the Adjustment Board.

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[8] This would not mean that the individual may not, whenever he sees fit, exercise the rights granted by Section 2, Fourth, and Section 3, First (i) and (j), to present his own case independently.

CONCLUSION

For the reasons suggested and because of the public interest in the question and the serious consequences of the Court's decision, it is respectfully requested that the Court grant the petitioner's application for a rehearing.

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